

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIRK WYNN, a/k/a KURT WYNN,

Defendant-Appellant.

UNPUBLISHED
February 24, 2005

No. 251350
Wayne Circuit Court
LC No. 02-013885-01

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant appeals as of right from his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, entered after a jury trial. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Complainant alleged that defendant stabbed him following a struggle. He denied that he shot defendant. Complainant's friend corroborated complainant's version of the events. Defendant maintained that he went to speak with complainant about an attack on his nephew by complainant and others, and acknowledged that his nephew accompanied him to the scene. Defendant asserted that complainant shot him, and that in turn he stabbed complainant.

During rebuttal closing argument, the prosecutor noted that while defendant's nephew accompanied defendant to the scene, the nephew did not testify to corroborate defendant's version of the events. Defense counsel objected on the ground that the prosecutor was shifting the burden of proof; however, the trial court noted that defendant had no duty to prove anything, and concluded that the prosecutor had the right to argue based on the evidence.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

A prosecutor may not shift the burden of proof. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). However, a prosecutor may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999)

Defendant argues that the prosecutor denied him due process and a fair trial by improperly commenting on his failure to present his nephew as a witness in his defense. We disagree and affirm. When a defendant advances an alternate theory, the prosecutor's comments on his failure to call corroborating witnesses or to produce corroborating evidence do not shift the burden of proof. *Fields, supra* at 111-112; *Reid, supra* at 478-479. An argument that corroborating witnesses were not called merely points out the weakness in the defendant's case. *Fields, supra* at 112. The prosecutor did not allocate to defendant the burden of disproving an element of the charged offense; therefore, the observation that defendant did not call his nephew to corroborate his version of the events did not improperly shift the burden of proof. *Id.* at 112-113. Furthermore, the trial court's immediate comment that defendant was not required to prove anything, coupled with the subsequent formal instructions that the prosecutor had the burden of proof and that the attorneys' arguments were not evidence, cured any prejudice created by the prosecutor's comments. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen